

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

COLUMBIA RIVER RENTALS, LLC,
an Oregon corporation,

Plaintiff,

Civil No. 08-395-HU

v.

ORDER

RONALD GARY PHILLIPS, SAFECO
INSURANCE COMPANY OF AMERICA,
FIRST NATIONAL INSURANCE COMPANY
OF AMERICA, PENNY CREEK QUARRY,
LLC,

Defendants.

HAGGERTY, District Judge:

Magistrate Judge Hubel issued a Findings and Recommendation [33] in this action that recommended that plaintiff's Motion for Partial Summary Judgment [22] should be denied, and that defendant First National/Safeco's Motion for Summary Judgment [18] should be granted in part as to the duty to defend. Plaintiff filed Objections [37] to the Findings and Recommendation, contending that the court should find that plaintiff is an insured under the policy and is entitled to a defense from defendant First National.

When a party objects to any portion of a Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). The Objections were filed in a timely manner. The court has given the file of this case a *de novo* review, and has also carefully evaluated the Magistrate's Findings and Recommendations, the objections, and the entire record. Plaintiff's Objections are overruled and the Findings and Recommendation is adopted.

ANALYSIS

Magistrate Judge Hubel provided a thorough analysis of the facts and circumstances in this action. Moreover, the parties have stipulated to the relevant factual background in this matter. These facts need not be repeated here.

Plaintiff advances largely the same arguments presented to, and carefully considered by, the Magistrate Judge. It is appropriate to emphasize that the Findings and Recommendation's scope was expressly limited to analyzing whether defendant First National is obligated to defend plaintiff against (1) the claims asserted by a third-party lessee (Phillips) and (2) the claims asserted by employees of that third-party lessee. The Findings and Recommendation does not address the possible liability the lessee Phillips may owe to plaintiff and other issues related to the lessee's possible contractual breaches.

After reviewing plaintiff's objections, and the entire record, this court concludes that the Findings and Recommendation properly construed "held liable," the phrase at issue in plaintiff's primary objection. Notwithstanding plaintiff's references to Washington court decisions that engage in phrasings that deploy the word "liable" when addressing the law of contributory fault,

the Findings and Recommendation correctly reasoned that the lessee Phillips cannot be "held liable" for his own – or, in this case, his employees' – injuries. Accordingly, plaintiff cannot be construed as an additional insured under these facts and the plain meanings of the applicable insurance provisions.

Similarly, plaintiff's objections that this reasonable construction should be viewed as an exclusion is without merit. As the Magistrate Judge recognized, the challenged provision is not found in a subsection titled "Exclusions," but instead is within the section defining the coverage provided for an additional insured:

the policy still uses positive language when it states that a person or organization is an insured to the extent the named insured is liable. While this may have the effect of denying coverage for a person or organization otherwise meeting the initial definition but whose liability cannot be derived from the liability of the named insured, the policy does not use negative exclusionary language to accomplish its intent. Rather, the provision simply grants coverage to a subset of those who might initially meet the definition for additional insureds.

Findings and Recommendation at 13-14.

Plaintiff's disagreement with this logical reasoning is overruled.

Other objections, including plaintiff's allegations that the Magistrate Judge engaged in unpersuasive "policy-based arguments," and that Phillips' potential liability in contract should have triggered defendant's duty to defend plaintiff, and that defendant's policy should have been found to be ambiguous, have been considered and are rejected. The reasoning presented in the Findings and Recommendation regarding these issues is sound.

Finally, plaintiff's argument that the court should conclude that Phillips waived his immunity under the Washington Industrial Insurance Act has been considered and is rejected.

Under the undisputed facts presented, there is no waiver, explicitly or implicitly, of this immunity.

CONCLUSION

The Findings and Recommendation [33] in this action is ADOPTED. Plaintiff's Motion for Partial Summary Judgment [22] is denied, and defendant First National/Safeco's Motion for Summary Judgment [18] is granted in part as to the duty to defend. Plaintiff's Objections [37] to the Findings and Recommendation are overruled.

IT IS SO ORDERED.

Dated this 6 day of March, 2009.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge